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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 115

WILLIAM FORREST TRAFTON,
Appellant,

vs.

STATE OF TEXAS,
Appellee.

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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vs.

STATE OF TEXAS,
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STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 26,542

EX PARTE: WILLIAM FORREST TRAFTON

To The Honorable Supreme Court of the United States:

The Appellee in the above entitled cause for its statement in opposition to Appellant's statement as

to jurisdiction herein, and in support of Appellee's motion to dismiss or affirm, respectfully shows the following:

STATEMENT OF ISSUES ON APPEAL

The question sought to be presented in this appeal is Appellant's claim that Article 797, Texas Penal Code (Vernon 1948) and Section 134a of Article 6701d, Texas Civil Statutes (Vernon 1948) are each too vague and indefinite in that the phrases "excessive or unusual noise" or "annoying smoke" found in each of these statutes, do not sufficiently set a standard of conduct which would apprise a person of ordinary intelligence with reasonable certainty what standard of conduct is required to comply with such statutes, and therefore these statutes are repugnant to the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED

Tex. Pen. Code (Vernon 1948) Art. 797:

> "Every motor vehicle must have devices in good working order which shall at all times be in constant operation to prevent excessive or unusual noises, annoying smoke, and the escape of gas or steam. Pipes carrying exhaust gas from the engine shall be directly parallel to the ground or slightly upward. Devices known as 'Muffler cut-outs' shall not be used within the limits of any incorporated city or town or on any public highway where the territory contiguous thereto is closely built up. Any person violating any provision of this article shall be fined not to exceed one hundred dollars."

Tex. Civ. Stat. (Vernon 1948) Art. 6701d, Sec. 134(a) and (b):

> "Sec. 134. (a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke and no person shall use a muffler cut-out, by-pass, or similar device upon a motor vehicle on a highway.
>
> "(b) The engine and power mechanism of every motor vehicle shall be so equipped and adjusted as to prevent the escape of excessive fumes or smoke."

These claims of repugnancy the Appellee denies and the highest State court, the Court of Criminal Appeals of Texas in the opinion and judgment here challenged determined the question so raised by Appellant adversely to him. See Appellant's Statement as to Jurisdiction, Appendix "A", pages 12-16, wherein the opinions of the Court of Criminal Appeals of Texas are set out in full. (Opinions of the Court of Criminal Appeals are not yet published.)

This question has also been determined contrary to Appellant's contention by our civil courts in the very recent case of *The Department of Public Safety v. Buck*, 256 S.W. 2d 642 (Tex. Civ. App. 1953, error ref.). See Appellant's Statement as to Jurisdiction, Appendix "A", pages 17-24.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE ATTEMPTED APPEAL

The Appellant on page 2 of his Statement as to Jurisdiction cites several cases supporting the con-

tention that this Court will review a judgment on a direct appeal. However, there must be a substantial federal question raised which must be more than formal, and not so devoid of merit as to be frivolous, nor foreclosed by prior decisions of this court so as to leave no room for real controversy. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court upheld an ordinance of the City of Trenton, New Jersey, which declared it unlawful for any person to use or operate on the public streets, alleys or throughfares of the city any device which emits loud and raucous noises and which is attached to any vehicle operated or standing. The Court said:

> "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Appellant conveniently sets out in his Statement as to Jurisdiction in Appendix "B" at pages 24-33 the statutes from 36 states which are analogous to the Texas statutes involved herein. We call to the Court's attention the fact that each of these statutes uses substantially the same wording as contained in our Texas statutes, i. e. "excessive or unusual noises and annoying smoke" to define the provisions of this penal law. Appellant contends that the use of these

words is too vague and indefinite for the man of ordinary intelligence to be apprised of the offense. We submit that men of ordinary intelligence of 37 State legislatures (including Texas) knew the meaning to be conveyed by the use of "excessive or unusual noises or annoying smoke" when they met and wrote their laws. It should also be noted that almost all the statutes set out in Appendix "B" make the use of a "cut-out" illegal. The ordinary man has been familiar with the usual sound of motor vehicles for many years, and the definiteness of the statutes here involved cannot be denied.

An Idaho statute declared it to be a misdemeanor for any person having charge of sheep to allow them to graze on a range previously occupied by cattle. It was attacked on the ground that it was indefinite and void. The Court said:

> "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited." *Omaechevarria v. Idaho*, 246 U.S. 343 (1918).

We think any ordinary interested person would have no difficulty in determining whether or not an excessive and unusual noise or offensive or excessive exhaust fumes accompanied the operation of an automobile.

The Appellant on page 9 of his Statement to the Jurisdiction states "the ordinary citizen could not be expected to know the extent to which exhaust noises of a motor may be reduced *without serious impairment of the efficiency of the motor*,*" and fur-

* Emphasis added throughout.

ther states that the Court (Court of Criminal Appeals of Texas, Opinion on page 13 of Appellant's Statement as to Jurisdiction) expressly states that such amount "is a question for experts in that field." Appellant then states that the Opinion is ambiguous. We submit that the way Appellant has taken the sentence out of context he himself has created the ambiguity because a careful reading of the Opinion indicates that it is not the efficiency of the engine of an automobile that we are concerned about. That *is* for the experts. We are concerned with the noise as the man of ordinary intelligence knows it. The experts are those at the factories who determine the ratio between efficiency and noise, and they have been doing so for many years, and the ordinary man has been listening to these sounds for many years.

Two Texas State courts of last resort have already passed upon the validity of the statutes involved herein and the opinions are set out in full in Appellant's Statement as to Jurisdiction, pages 12-24. These statutes must be read in the light of the construction placed upon them by the State courts. *Union Lime Company v. Chicago and Northwestern Railway Company*, 233 U.S. 211 (1913). In *Roe v. Kansas*, 278 U.S. 191 (1928), the Plaintiff in error contended that legislation under which condemnation proceedings were being conducted conflicted with the Fourteenth Amendment. The Kansas statute involved provided that the power of eminent domain extended to any parcel of land which possesses "unusual historic interest." Plaintiff in error alleged that the statute did not adequately specify the reason for the condemnation and failed to reveal the use to

which the property would be put. The Kansas Supreme Court said, "The meaning of the statute is clear enough . . ." and the Shawnee Mission is a place invested with unusual historic interest, and the use is a public one. This Court stated at page 193 of its Opinion that, "Under the circumstances here revealed the construction placed upon her statutes by the Supreme Court of Kansas is binding upon us." In *McGahey v. Virginia*, 135 U.S. 662 (1890) the Court states at page 667:

> "In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon the court; but where the question raised is whether a contract has or has not been made . . ." the court going on to say that it may inquire and judge for itself.

And in *McCulloch v. Virginia*, 172 U.S. 102 (1898) at page 109, the Court states:

> "While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a State upon its statutes and consituation, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired."

We therefore urge upon this Court the construction placed upon these statutes by the courts of the State of Texas upholding the validity thereof.

We further submit that the question presented in this appeal has been so definitely determined that no

substantial question is presented by this appeal and therefore Appellant cannot invoke the jurisdiction of the Supreme Court of the United States. *Zucht v. King*, 260 U.S. 174 (1922).

CONCLUSION AND PRAYER

WHEREFORE, Appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Court of Criminal Appeals of the State of Texas be affirmed.

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A copy of this Motion, together with a copy of the letter of transmittal to the Clerk of the U. S. Supreme Court, have been mailed this date to the Honorable Harry S. Pollard, Littlefield Building, Austin, Texas, Attorney for Appellant, (First Class Postage Prepaid).